NO. _____

IN TH
SUPREME COURT OF T

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CHARLES D. SEPTOWS
Petitioner,

v.

DONALD S. MCGEHEE
Respondents,

ON PETITION FOR A WR
STATES COURT OF APP

PETITION FOR WRI
AND APP

PROF. C
Counsel
Attorney
P.O. Box
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Supreme Court, U.S.
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OF CERTIORARI
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HARLES SEPTOWSKI (P34065)
f Record
or Petitioner
943
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36 pp

QUESTION PRESENTED

1. Does a prosecutor violate an a attorney's rights under The Fourteenth Amendment by causing the attorney to be Searched during a court proceeding, where the attorney is the Litigant.

2. If the answer to the first question is "yes", was such a right clearly established in November 1995.

3. This case is very close to the issues now under review in the pending case Conn v. Gabbert No. 97-1802

PARTIES

There is no parent or subsidiary company to be Listed under Rule 29.1

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OPINIONS BELOW

The District Court for the Eastern District of Michigan granted the Defendant's motion to dismiss by analyzing the motion as a Rule 56 Motion for Summary Disposition on September 18, 1997. A motion for reconsideration was timely filed and denied by the Court, November 7, 1997.

A timely appeal was filed with the 6th Circuit Court of Appeals who issued a memo decision affirming the District Court's decision on November 23, 1998.

STATEMENT OF BASIS OF JURISDICTION

The Petitioner seeks to invoke the jurisdiction of the Court by seeking a Writ of Certiorari from the Judgement of the 6th Circuit Court of Appeals denying a remand of the federal and constitutional questions. Jurisdiction is conferred upon the Court to review the Judgement and order in question by Writ Of Certiorari pursuant to 28 U.S.C. Sec. 496 as set forth in Supreme Court Rules of Court Rule 10(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution – Equal Protection
And Fundamental Due Process

STATEMENT OF THE CASE

On May 20th 1990, there was a fire at the law offices Of the Petitioner. At that time the Petitioner was a judicial Candidate who had been warned to drop out of the political Race or else. After the fire, a politically motivated investigation Sought to blame the Petitioner for the fire and criminal charges Were instituted by the Petitioner's opponent. At the preliminary Examination the charges were dismissed. Thereafter, the Petitioner pursued civil litigation to hold the insurance company Responsible and the Investigators who had participated in the Politically motivated Prosecution. Settlement was reached with the insurance company above policy limits. A malicious prosecution action was initiated to hold the individuals and City responsible for the false charges.

During the tendency of that litigation a hearing was held in the Michigan Court of Appeals over the propriety of the entry of a partialSummary Disposition motion, on November 21,1995. The Attorney General for the State of Michigan representing the Michigan State Police investigator advised the Court that the Petitioner represented a security risk to the proceedings, falsely alleging that the Petitioner had created a disruption in the lower Court hearing. The Court suspended the docket so that the Michigan State Police could search the Petitioner. The hearing then proceeded with two uniformed State Police officers standing guard over the Petitioner during the hearing. The Appeals Panel affirmed the lower Court ruling.

This suit was then instituted to hold the Defendant responsible for his miss-use of his official power to disrupt that proceedings and abridge the Petitioner's rights by offering false reports that resulted in the loss of a fair and full hearing of Petitioner's claims.

The federal suit was brought as a civil rights claim, 43 U.S.C. Sec. 1983. The Defendant's claimed Absolute Immunity and filed a motion to dismiss the complaint. As this was a question of law, the Petitioner's Counsel did not provide evidence Of the false statements of the Attorney General. The District Court finding a qualified Privilege then analyzed the Defendant's motion as one for Summary Disposition. As the record was blank on the issue of impropriety of the Attorney General making the false allegations, the Court granted the Defendant's motion by engaging in fact finding and outcome determinations. A motion for reconsideration was filed by the Petitioner including affidavits from the Court security Officer and other attorneys that documented the peculiarity of this search and controvert the affidavits from the Defendant, documenting genuine issues of fact on the accuracy and propriety of the Defendant's assertions. The District Court denied the motion for Reconsideration and the 6th Circuit Court of Appeals affirmed the District Court's Order.

Accordingly, this appeal is filed with this Court.

ARGUMENT

1. THAT THE PROSECUTOR USING HIS OFFICAL POSITION TO CHILL COURT PROCEEDINGS BY SETTING IN MOTION, HAVING THE OPPONENT LITIGANT ATTORNEY SEARCHED DURING A HEARING IS REPUGNANT ON ITS FACE AND RAISES A "PER SE" IMPROPRIETY WHICH SO TAINTS THE PROCESS AS TO MAKE THE EVENTUAL RULING INDEFENSIBLE AS FULL AND FAIR DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW

The Petitioner as an attorney, law professor, recognized CPA, former advisor to the White House, Governor's office and State Police in Michigan should be afforded the same rights as any litigant. Among those recognized rights is the opportunity to have claims reviewed impartially by a panel un-tainted by political process and false statements. Our concepts of equal protection under the law and fundamental due process require that all proceedings be objectively fair. Where the playing field is un-even due to the actions of one party or the process is tainted, we generally require that the we back up and do what's right,

The Petitioner's contention in this matter, is that the Assistant Attorney General for the State of Michigan used his official position and power made knowingly false statements to"rig", "taint" and "manipulate" the 1995 Michigan Court of Appeals

hearing to bolster an otherwise un-supportable lower court ruling. As we all know the old adage – if you have bad facts argue the law, if you have bad law argue the facts and it you have neither refocus the proceeding. Here the Petitioner contends the disruption of the Court proceedings initiated by the Defendant to search the Litigant /Attorney is just such a refocus. The Petitioner's contention is that this intentional offering of false information is a "per se" violation of his civil rights.

The Petitioner is not an "un-stable" person. He is an attorney, law professor, and advisor to business, government and commerce. A recognized outstanding CPA, a CPA president, a CFE (certified fraud examiner) and a leader in tax and commercial affairs. The entire premise accepted by the District Court in the attached opinion is that the Defendant's self serving assertions, are objectively true. They are not and given the opportunity, they can be shown as false. The record already documents that there are disputes on this point and that the Summary Disposition granted should be reversed.

We live in a time of great social and political upheaval. Belief in truth, fairness, the system's working, are very suspect. When we start searching attorneys and fail to inquire was this proper or contrived, we cross a line that changes the objective fundamental fairness of the process.

If the system isn't perceived as fair, as working, then the allegiance of all citizens are imperiled, as is our republic. We live by the rule of law. That it is equally and fairly applied.

This case needs to be reviewed by this Court because under the standard of the Courts own Rules, {Rule 10a), a case that departs from the accepted and usual course of judicial proceedings is a matter that calls for the Court's exercise of its supervisory power. Accordingly, the Petitioner (who is also a member of the Bar of this Court), is asking this Court exercise its discretion to accept this Writ application or remand this matter to the District Court for development of the record to support the Petitioner's assertions and overturn the summary elimination of the Petitioner's claims solely due to the palpable error of his counsel..

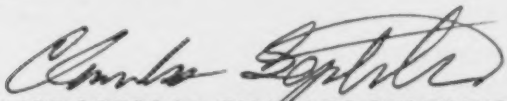
Petitioner is asking for **one hearing** after eight years of litigation to demonstrate that **all** of the allegations from the fire forward lack merit, thereby.clearing himself of the false, misleading and half-truths set forth in the various allegations used as repeated assaults on his character and good name. In both the original state court action and this case, Petitioner's Counsel did not add evidentiary proofs to the record until the motions for rehearing, after grant of Defendant's summary disposition motions. It is these palpable errors that bring this matter to this docket. This was not previously presented, as it was withheld from the Petitioner. Petitioner is left to bring this matter to the Court "pro se", as Counsel has now abandoned their errors.

All of the legalese argument aside, why would an Attorney/CPA burn an under-insured law office while running for a Judgeship? That basic starting point doesn't make sense, nor do the subsequent allegations. Fundamental due process demands, despite the palpable errors of Petitioner's prior counsel, the opportunity for Petitioner to have a hearing to vindicate himself

and demonstrate the grievous harm done to him by falsely painting him as an "unstable arsonist".

This is no longer about money or claims, merely the opportunity to have a fair hearing to clear the Petitioner of the false allegations over these many years, so that the truth can be revealed.

Respectfully Submitted:

BY: 

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Dated February 8, 1999

Member Michigan, Missouri, Pennsylvania, Texas Bars, Federal Bar Eastern District of Michigan and Southern District of Texas, US Tax Court and US Supreme Court, Outstanding CPA 1998, CPA PRESIDENT 1999-2000 Austin Texas

APPENDIX TO PETITION FOR CERTIORARI

MEMORANDUM AND OPINION
Filed November 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES D. SEPTOWSKI,

Plaintiff-Appellant,

No. 97-2095

v.

DONALD S. MCGEHEE,
Defendant-Appellee

—

BEFORE: MARTIN, Chief Judge; KEITH and NORRIS, Circuit Judges.

PER CURIAM. Plaintiff Charles Septowski, appeals from granting summary disposition to defendant Donald McGehee.

After carefully considering the record on appeal, the briefs of both parties and the applicable law, and having had the benefit of oral argument, we agree with the court's grant of summary disposition to the defendant.

Because the reasoning that supports judgment for the defendant has been clearly articulated by the district court in a thorough and

comprehensive opinion, the issuance of a detailed written opinion by this court would be duplicative. Accordingly, the judgment rendered by the Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, is **AFFIRMED** on the basis of the reasoning detailed in the Opinion and Order dated September 22, 1997.

ORDER DENYING MOTION FOR RECONSIDERATION
Filed November 7, 1997

UNITED STATES DISTRICT COURTt
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES D. SEPTOWSKI
Plaintiff,

Case No. 97-70158
Honorable Gerald E. Rosen

v.

DONALD S. MCGEHEE
Defendant,
---/

At a session of said Court held in
The US Courthouse, Detroit, Michigan
On November 7, 1997
Present: Honorable Gerald E. Rosen
United States District Judge

This matter is before the Court on the Motion of Plaintiff Charles D. Septowski for Reconsideration of the Court's September 18, 1997 Opinion and Order and Judgement granting Defendant's Motion for Summary Judgment and dismissing Plaintiffff's Complaint in its entirety. Plaintiff contends that the Court erroneously determined the Defendant McGehee, although not entitled to absolute immunity, was entitled to qualified

immunity from suit on Plaintiff's Section 1983 claims because his actions in reporting his concerns about Plaintiff to the Court of Appeals security officer were "objectively reasonable" and consistent with his role as an "officer of the court".

The grounds for the granting of motions for reconsideratin are set forth in Eastern District of Michigan Local Court Rule 7.1(h)(3):

(h) Motions to alter or amend a Judgment or for Rehearing or Reconsideration

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(3) Grounds, Generally and without restricting the discretion Of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court either expressly or by reasonable implication shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been mislead but also show that a different disposition of the case must result from correction thereof.

The Court has reviewed Plaintiff's Motion for Rehearing and finds that Plaintiff has merely presented the same issues already ruled upon by the Court in its June 11, 1997 opinion and Order and Judgment either expressly or by reasonable implication. Plaintiff merely restates arguments made in her opposition briefs and/or at oral argument.

Moreover, since the time that the Court rendered its September 18, 1997 decision, the Sixth Circuit has issued its opinion in McPherson v. Kelsey, __ F.3d ____, 1997 WL 60026 the court(6th Cir.) (October 1, 1997) in which the Court broadly

interpreted "objective reasonableness" for purposes of qualified immunity. McPherson involved facts substantially similar to the facts in this case. In McPherson the Plaintiff brought a Section 1983 and state law claims against court officers and a judge who had reported to police authorities their concerns that the plaintiff who was a party in a judicial proceeding awaiting hearing, posed a security risk to the court. The Sixth Circuit held that the Defendants who reported their concern to the police and the officers who subsequently conducted a pat-down search of the plaintiff were entitled to qualified immunity on the Plaintiff's Section 1983 civil rights claims and to absolute immunity under state law on his state law claims.

McPherson adds further support for the Court's September18, 1997 ruling in this case.

For these Reasons,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Rehearing be and hereby is DENIED

/s/ Gerald E. Rosen, US District Judge

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Filed November 23, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES D. SEPTOWSKI
Plaintiff,

Case No. 97-CV-70158
Honorable Gerald E. Rosen

Vs.

DONALD S. MCGEHEE,
Defendant
_____/

INTRODUCTION

Plaintiff Charles D. Septowski , initiated this suit in Wayne County Circuit Court. It was then timely removed to the United States District Court (by) Defendant Donald S. McGehee.

Defendant answered Plaintiff's complaint and provided plaintiff with requested discovery. Subsequently Defendant filed a Motion to Dismiss, or for Summary Disposition, to which Plaintiff has responded.

Having reviewed the party's briefs and the record of this matter, the Court has concluded that oral argument on

Defendant's motion is not necessary. Therefore, pursuant to Eastern District of Michigan local Rule 7.1(e)(2), this matter will be decided "on the briefs". This Opinion and Order sets forth the Court's ruling.

II FACTUAL BACKGROUND

Plaintiff is a resident of Texas and is licensed to practice law in Michigan. Defendant is an Assistant Attorney General for the State of Michigan. Plaintiff's Complaint alleges that, prior to oral argument in the Michigan Court of Appeals in Septowski v. Poisson et. Al., Court of Appeals No 176869, Defendant wrongly informed the Court of Appeals security officers that the Plaintiff posed a potential threat to the Court. This statement, according to the complaint, was sufficiently serious to cause the court to conduct a search of the plaintiff and "guard him" during the oral argument.

In order to fully understand the context of litigation, some background information is necessary.

On May 20, 1990, the River Rouge Fire Department received a telephone alarm concerning a fire in the building that contained the Plaintiff's law office. After a preliminary investigation into the fire, the Fire Marshal concluded that arson was the cause of the fire. At this point, the Fire Marshal requested and received help from the Michigan State Police. After further investigation, on September 5, 1990, a warrant was authorized for the Plaintiff's arrest on the charge of arson. At the November 2, 1990, preliminary examination, the judge dismissed the charges against the plaintiff.

Following the dismissal of the charges against him, Mr. Septowski filed a civil action alleging false arrest, false imprisonment and malicious prosecution in Wayne County Circuit Court against the Fire Marshal and the Michigan State Police Deputy Sergeant, John Worden, who assisted the Fire Marshal. Defendant McGehee represented Deputy Sergeant Worden in the state court action. That case was ultimately dismissed on Defendant's Motion for Summary Disposition.

Mr. Septowski then filed an appeal of right with the Michigan Court of Appeals which was scheduled for oral argument on November 21, 19995. The Defendant's acts complained of by the Plaintiff in the instant action occurred before and during the Court of Appeals hearing.

According to his sworn affidavit, Defendant McGehee was surprised and concerned when he saw Mr. Septowski in the Court of Appeals hearing room. Defendant's concern was based on his perception of the Plaintiff's instability during the previous trial court proceeding. His perception of Plaintiff's instability was based on the following: 1) the nature of the evidence against the plaintiff in the underlying criminal arson case, 2) during the Plaintiff's deposition he appeared very agitated and upset, and although Plaintiff did not engage in any overt threatening acts towards Defendant, his actions nonetheless left Defendant feeling uncomfortable; 3) at the conclusion of the hearing on the Motion for Summary Disposition in Wayne County Circuit Court, the court bailiff (a Wayne County Deputy Sheriff) approached Defendant and advised him to remain in the courtroom until Plaintiff had ample time to exit the City-County Building.

(Apparently, the bailiff observed the Defendant had, i.e. that the Plaintiff appeared very disturbed and angry regarding Judge MacDonald's decision to dismiss the lawsuit against Worden, 4) Deputy Sergeant Worden also reported to Defendant that during oral argument, Plaintiff had stared him down in an angry manner; 5) that there was a complete lack of security, including no medal detectors at the Court of Appeals and 6) Plaintiff had flown in from Texas.

Defendant related his concern to the court security officer who then informed the chief judge of the Court of Appeals hearing panel. At the request of the chief judge, Defendant and Plaintiff's attorney met with the chief judge in chamber. Upon inquiry by the judge, Defendant advised the court of his concern of the possible threat imposed by the Plaintiff, but specifically informed the court that he could not be sure what, if any, threat the Plaintiff actually posed. After listening to the Defendant's concerns and the basis for them, the chief judge decided to request that the Plaintiff submit to some type of search. Michigan State Police officers then conducted a frisk of the Plaintiff and remained close to him during the oral argument. Defendant was not present during the search and does not have personal knowledge of the extent of the search.

After listening to the oral argument of counsel, the Court of Appeals ruled against the Plaintiff and affirmed the Circuit Court's dismissal of the complaint. Plaintiff then filed a Motion for Rehearing asking for a rehearing before a different panel of judges. The basis for the motion was Defendant McGehee's communication to the court security officer and the resulting

action taken by the chief judge of the original hearing panel. Plaintiff's request for rehearing was denied.

Plaintiff subsequently filed an application for leave to appeal to the Michigan Supreme Court. That application was also denied. Plaintiff then filed a grievance against Defendant with the Attorney Grievance Commission. After investigation by the commission, the grievance was dismissed. Plaintiff then initiated this lawsuit.

III DISCUSSION

Plaintiff seeks to hold Defendant McGehee liable fore 1) violation of Civil Rights and Civil Conspiracy; 2) violation of Michigan Constitution and Civil Conspiracy, 3) slander and civil conspiracy, 4) Invasion of Privacy and Civil Conspiracy and 5) Intentional Infliction of Mental and Emotional Distress and Civil Conspiracy. In Response, Defendant has filed a Rule 12(b) Motion for Dismissal or alternatively a Rule 56 Motion for Summary Judgement.

Because Defendant is relying on materials outside of the pleadings in support of his motion for dismissal, in accordance with Fed.R.Civ.P 12 (b)(6), the Court will treat Defendant's motion as one for Summary Judgement under Rule 56.

A. STANDARDS APPLICABLE TO A MOTION FOR SUMMARY JUDGEMENT

Summary Judgement is proper "in the pleadings, depositions, answer to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to judgement as a matter of law." Fed. R.Civ.P. 56©.

Three 1986 Supreme Court cases Marushsia Electrical Industrial Co. v. Zenith Radio Corp., 45 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc. 477 U.S. 2424 (1986); and Celortex Corp. V. Catrett, 477 U.S. 317 (1986) – usher in a "new era" in the standard of review for a summary judgement motion. ([1]1).

These cases, in the aggregate, lowered the movant's burden on a summary judgement motion. (1) According to the Celotax Court,

> In our View, the plain language of the Rule 56© mandates the entry of summary judgement, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which the party will bear the burden of proof.

Celotex, 477 U.S. at 322.

After reviewing the above trilogy, the Sixth Circuit established a series of principals to be applied to motion for summary judgement. They are summarized as follows:

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[1] Taken together the Three cases signal to the lower courts that summary judgement can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials.' 10A.C. Wright, A. Miller, M. Kane, Federal Practice and Procedure, Sec. 2727 at 35 (1996 Sup.)

2 It is unclear within Plaintiff's complaint which prong of invasion of privacy that Plaintiff is begging for relief under. However, Plaintiff has since clarified in his response to Defendant's Motion for Summary Judgement.

* Bases involving state of mind issues are not necessarily appropriate for summary judgement.

- The movant must meet the initial burden of showing "the absence of genuine issue of material fact" as to an essential element of the non-movant's case. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.

- the respondent cannot rely on the hope that the trier of fact will believe the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgement."

- The trial court no longer has the duty to search the entire record to establish that it is the bereft of genuine issues of material fact.

- The trial court has more discretion than in the "old era" in evaluating the respondent's evidence. The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, "(w)here the record taken as a whole could not lead a rational, trier of fact to find" for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is plausible.

Street v. JC Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989), See also. Nerneberg v. Pearce, 35 F.3d. 247, 249 (6th Cir. 1994).

B DEFENDANT'S CLAIM THAT HE IS ENTITLED TO ABSOLUTE IMMUNITY

Defendant first claims that his role as Assistant Attorney General of Michigan entitles him to absolute immunity, This immunity would supercede any liability under state law as well as under 42 U.S.C. Sec. 1983 because the statute does note and does not intend to, abolish common law immunities. Tenney v. Brandhove, 342 U.S. 367, 376, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951).

Absolute immunity has derived from the common-law immunity granted to judges and has been extended to prosecutors when the prosecutorial activity is "intimately associated with the judicial phase of the criminal process." Ireland v. Tunis, 1997 Wl 250434 *7 (6th Cir. (Mich.)) quoting Imblar v. Pachrman, 424 U.S. 409, 420 96 S.Ct. 984, 47 L. Ed.2d 128 (1976). The Sixth Circuit has consistently held that the "the critical inquiry *is how* closely related is the prosecutor's challenged activity to his role as an advocate intimately associated with the judicial phase of the criminal process." Pusey v. City of Youngstown, 11 F.3rd 652, 658 (6th Cir. 1993), cert. Denied 512 U.S. 1237, 114 S.Ct. 2742, 129 L. Ed. 2d 862 (1994). The Supreme Court has further defined the fundamental relationship between a prosecutor's acts for purposes of absolute immunity as "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State." Buckley v. Fitzsimmons. 509 U.S. 259, 273, 113

S.Ct. 2606, 125 L.Ed.2d 209 (1993). However, "those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not absolutely immune from liability. Id.

Here although Defendant appeared at the Court of Appeals for oral argument in the Septowski v. Poisson appeal, Defendant cannot be afforded absolute immunity for his actions with regard to the Plaintiff's attendance at the appellate hearing. Absolute immunity only extends to the preparatory functions at the prosecutor. Here, the security concern of the Defendant was unrelated to the actual judicial proceeding of the day. There is no indication that, by voicing his concern, Defendant was pursuing the initiation of a judicial proceeding or acting within the course of his advocacy role. Instead, Defendant's expressed concern in the form or a warning falls outside the scope of his role as an advocate of the State. Therefore, the doctrine of absolute immunity does not extend to the Defendant in this situation.

C. DEFENDANT'S CLAIM THAT HE IS ENTITLED TO QUALIFIED IMMUNITY.

The Supreme Court has held that State actors sued in their individual capacities "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 296 (1982). The Supreme Court has further explained that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, L.Ed.2d 523 (1987).

Moreover, "(t) he relevant inquiry focuses on whether a reasonable official in the defendant's position could have believed his conduct to be lawful, considering the state of the law as it existed when the defendant took his challenged actions." Poe v. Haydon, 838 F.2d 418, 423-24 (6th Cir. 1988), cert. Denied 488 U.S. 1007 109 S.Ct. 788, 102 L.Ed.2d 780 (1989).

The Sixth Circuit has recently addressed the issue of qualified immunity within the criminal context of an arrest warrant in Ireland v. Tunis, 1997 WL 250434 (6th Cir. (Mich)). In that case, the Sixth Circuit considered whether qualified immunity would extend to an investigator that vouched for the truth of the contents of a criminal complaint in front of a judicial officer. Id. at *13. The Court held that the investigator should be immune if reasonably competent officers would disagree on whether there was probable cause to issue a warrant. Id.

Accordingly, this Court must review the actions of the Defendant under a standard of "objective legal reasonableness." See Malley v. Briggs, 475 U.S. 335, 341, 89 L.Ed.2d 271 (1986) Here, since Defendant was informing the court of his specific safety concerns, Defendant may have been acting outside of his role of prosecutor. However, like any attorney, Defendant is an "officer of the Court." By taking the precautionary measure of informing the court security officer and the chief judge of the appellate panel possible security risk to the court, or acting in the capacity of a reasonable official. In such a case, it appears to this Court that any reasonably competent official would have acted as the Defendant did by informing the court of his concern. Therefore, the Court finds Defendant's conduct on November 21, 1995 to have been "objectively reasonable."

Furthermore, there is nothing to suggest that the Defendant would have ever considered his conduct to be unreasonable, unlawful or violative of any substantive right of the Plaintiff. The Sixth Circuit has upheld the constitutionality of brief searches upon entering the courthouse. Downing v. Kunzig, 454 F.2d 1230, 1232 (6th Cir. 1972). Therefore, Defendant could not have assumed that his statements would violate a right to the Plaintiff. Moreover, all that the Defendant did was inform the court security officers and at the security officer's direction, the chief judge of his security concerns. Defendant did not authorize, conduct or even suggest that the Plaintiff be patted down. That decision was made by the chief judge. It is unreasonable to hold the Defendant liable for a decision that he did not even make. Since Defendant's statement were not unreasonable and did not violate any substantive right of the Plaintiff, he is cloaked with qualified immunity from suit on the Plaintiff's federal claims. Therefore, Plaintiff's Section 1983 claims will be dismissed with prejudice.

In addition, to the federal claims, Plaintiff has also brought state law claims of slander, invasion of privacy, intentional infliction of emotional distress and conspiracy based upon the same communication made by the Defendant to the Court of Appeals. Defendant has also moved for summary judgement on the state claims.

D. GOVERNMENTAL IMMUNITY

The Michigan legislature has extended governmental immunity to its officials and employees. M.C.L. 691.1407 (2) ©, M.S. A. 3.996(107)(2)© provides:

An Employee... will be immune from tort liability
For injuries to person or damages to property caused
By the employee if all of the following are met:

a) the employee is acting or reasonably believes he or she is acting within the scope of her authority
b) the governmental agency is engaged in the exercise of discharge of a governmental function
c) the employee's conduct does not amount to gross .negligence that is the proximate cause of the injury or damage

Gross Negligence means conduct so reckless as to demonstrate a substantial lack of concern for whether injury result.

Here governmental immunity extends to the Defendant in regard to the slander claim. First Defendant was clearly acting reasonably by informing the court of his concern. Second, although Defendant may have acted outside the role of an advocate, security was still essential in order to discharge his duty with respect to the hearing before the appellate court. Last, Defendant's actions were not so reckless as to demonstrate a substantial lack of concern for injury, thereby amounting to gross negligence. Therefore, since governmental immunity protects the Defendant from tort liability, he cannot be liable for state claims against him.

E. SLANDER

Even if governmental immunity did not immunize the Defendant from state tort liability, he claims against him can also be dismissed on their own merits.

Under Michigan law the four elements needed to maintain a cause of action for defamation are:

---

(1) a false or defamatory statement concerning the plaintiff,
(2) an unprivileged communication to a third party,
(3) fault amounting to at lease negligence on the part of the publisher,
(4) either actionability of the statement irrespective of the especial harm or the existence of the special harm caused by publication.

Duran v. The Detroit News, 200 Mich. App. 622, 633, 504 N.W. 2d 715 (1993).

First, the statements made by the Defendant to the security officer and the chief judge of the hearing panel were truthful. Defendant only communicated his own perceptions and concerns to the court. These concerns. Although ultimately proven wrong, were nonetheless true concerns of the Defendant at the time he communicated them to the security officer and the judge. If Defendant sworn that the Plaintiff was an actual security threat, perhaps the statements could be considered false. However, since Defendant never commented on any actual threat the Plaintiff posed, but merely the possibility threat, the Court still considers the statement referring to his perceptions to be truthful.

Second, Defendant's statement to the security officer and the chief judge of the hearing panel were privileged.

"The determination whether a privilege exists is one for the court. The elements of a qualified privilege are 1) good faith, 2) an interest to be upheld, 3) a statement limited in its scope to this purpose, 4) a proper occasion, and 5) publication in a proper manner and to proper parties only. A plaintiff may overcome a qualified privilege only by showing this statement was made with actual malice, i.e. with knowledge of the falsity or reckless disregarding of the truth. General allegations of malice are insufficient to establish a genuine issue of material fact."

Prysak v. R.L. Polk Co., 193 Mich. App. 1, 14-15, 483 N.W.2d 629, 636 (1992).

Accordingly, Defendant's communication to the court were privileged as they were made in good faith pursuant to his duty as an officer of the court. The statements were made on the proper occasion, to the proper parties, in the security interest of the court and were limited to protecting that interest.

Therefore, because Defendant's statements relaying his concerns were both truthful and privileged, the claim of slander against the defendant must be dismissed.

E. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In Roberts v. Auto Owner's Insurance Do, 422 Mich. 594, 602 (1985), the Michigan Supreme Court declined to adopt

the tort of intentional infliction of emotional distress into Michigan jurisprudence on the facts presented in that case, but descried the standard that would have to be met for satisfaction of such a claim.

> The cases thus far decided have found liability only where the defendant's conduct was extreme and outrageous. It has not been enough that the Defendant has acted with an intent which is tortious or even criminal, or that he had intended to inflict emotional distress, or even that his conduct has been characterized by malice," or a degree of aggravation which would entitle the Plaintiff for punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim "outrageous".

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an

unflattering opinion, and in some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

Id. At 602, citing Restatement Torts 2d Sec. 76 comments (emphasis added.)

Here this Court does not find the actions of the Defendant to be outrageous or extreme in character. Although his fears may have been proved to be unfounded, the steps taken to inform the court of his fear were both cautious and responsible. The facts do not portray a scenario in which the Defendant caused any type of fearful scene in open court. Instead, Defendant bought his concern to court security, who then relayed this concern to the chief judge. It is this Court's opinion that this is exactly the best method to deal with this type of concern and fear with an absolute minimum of prejudice towards the Plaintiff.

F. INVASION OF PRIVACY

The Plaintiff also seeks relief from invasion of privacy. The four possible claims, under Michigan Law for invasion of privacy are: 1) intrusion into a person's seclusion, solitude or private affairs, 2) public disclosure of embarrassing private facts about a person, 3) publicity that portrays a person in a false light, and 4) appropriation of a person's image or likeness. Baggs et al. V. Eagel-Picher Industries, 957 F.2d 268 (6th Cir. 1992). Here plaintiff's claim involves the third form of invasion of privacy.2

Plaintiff claims that Defendant portrayed Plaintiff in a false light as a threat to the court resulting in a pat-down search and guarding of the Plaintiff. According to the Plaintiff, such as allegation was false and made with willful disregard for the truth. As indicated above in this opinion, this Court disagrees with the Plaintiff because the Defendant merely relayed a possible concern of his to the court. In addition, Defendant specifically advised the Court of Appeals that he did not know what, if any, threat that the Plaintiff actually imposed but merely was conveying his concern that Plaintiff posed a possible threat. In light of the circumstances, there is nothing to suggest that this was an unreasonable statement by the Defendant. Furthermore, since Defendant made clear that he was uncertain as to whether a threat actually existed, there is no factual support for the proposition that the Defendant acted with willful disregard for the truth. Therefore, this Court finds no merit in Plaintiff's claim for invasion of privacy.

H MICHIGAN CONSTITUTION

Plaintiff's Michigan Constitutional claims include violations of due process, equal protection, access to the courts and the right to petition grievances, freedom of speech and unreasonable search and seizure. Plaintiff relies on the "facts" alleged in the complaint to support these claims. However, Plaintiff has not presented any "affirmative evidence" in support of the Plaintiff's allegations that such violations actually occurred. See Anderson v. Liberty Lobby, Supra. (To defeat a properly supported Motion for Summary Judgment, the respondent cannot rely on bare

allegations in his complaint but rather "present affirmative evidence" to support his claims.) Furthermore, since Plaintiff was in the courthouse there was not any unreasonable search and seizure. See Downing v. Kunzig, 454 F.2d 1230, 1232 (6th Cir. 1972). Moreover, even the "facts" alleged within the complaint are insufficient to establish any of the other causes of action. Therefore without sufficient facts to sustain any of the alleged violations of the Michigan Constitution, these claims must will be dismissed.

I CONSPIRACY

The courts are normally reluctant to grant summary judgment in a civil rights conspiracy case because the existence or non-existence of a conspiracy is generally a fact issue. Adickes v. Kress & Co. 398 US 144, 176, 90 S.Ct. 1598, 1618, 26 L.Ed.2d 142 (1970). However, the Eastern District of Michigan and other Michigan courts have consistently held that an allegation of conspiracy without any actionable underlying tortious acts or criminal activity is not in and itself actionable. Anthony v. Madison, 896 F. Supp 714 (E.D. Mich 1995), Knubbe v. Sparrow, 808 F. Supp. 1295 (E.D. Mich. 1992), Early Detection center v. New York Life Ins. Co. 157 Mich App. 618, 631, 403 N.W. 2d 830 (1986).

Here, as discussed above there is no evidence of any underlying tortious activity. The claims of slander, invasion of privacy and intentional infliction of emotional distress have already been found meritless, above. Accordingly, without such claims, there can be no legally cognizable conspiracy claim.

IV CONCLUSION

For the foregoing reasons,

NOW THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment in favor of the Defendant McGehee is GRANTED. Accordingly, this case is hereby DISMISSED in its entirety, with prejudice.

Let Judgment be entered accordingly.

Dated September 8, 1997

/s/ Gerald E. Rosen US District Judge